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COVAD
COMMUNICATIONS COMPANY

EX PARTE OR LATE FILED

October 5, 1999

Via hand delivery

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D. C. 20554

Re: CC Docket No. 98-147

Dear Ms. Salas:

On October 4, 1999, Jason Oxman and Thomas M. Koutsky of Covad Communications met with Carol Mattey, Staci Pies, Vincent Paladini, Jane Jackson, Margaret Egler, and David Hunt. The purpose of the meeting was to discuss the position of Covad regarding Commission pricing and provisioning jurisdiction, as more fully set out in the attached document.

Very truly yours,

Florence M. Grasso

Florence M. Grasso

cc: Carol Mattey
Jane Jackson
Margaret Egler
Staci Pies
Vincent Paladini
David Hunt

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Covad Communications 10/4/1999 *Ex parte*

Commission Pricing/Provisioning Jurisdication

- "... Section 201(b) explicitly gives the FCC jurisdiction to make rules governing matters to which the 1996 Act applies." Iowa Utilities Board v. FCC, 119 S. Ct. 721, 730 (1999).
    - "We hold, therefore, that the Commission has jurisdiction to design a pricing methodology." *Id.* At 733.
- Incumbent LEC offering line sharing to a competitive LEC is still recouping the full cost of the loop from the voice customer. Evidence that the full loop cost is recouped from the voice service is found in the xDSL interstate tariffs filed by incumbent LECs, which attribute zero loop cost to the line sharing that ILECs provide themselves or other ISPs.
- Incumbent LECs must provide "nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms and conditions that are just, reasonable, and nondiscriminatory . . ." 47 U.S.C. § 251(c)(3).
- If line sharing is a UNE, "nondiscriminatory access" to that UNE means access on the same rates, terms and conditions that the ILEC provides the UNE to itself.
- Thus far, the Commission has left pricing issues to the states . . . but line sharing cannot in the interim be left available only to incumbent LECs . . . .
    - **Conclusion**: The FCC should mandate interim line sharing as outlined in Covad's 9/30/99 ex parte. This step is necessary on an interim basis because ILECs are not currently providing CLECs with nondiscriminatory access.

Pricing of Line Sharing UNE

- Rate structures for UNEs are established either:

  (a) pursuant to the forward-looking economic cost-based pricing methodology set forth in §§ 51.505 and 51.511, or

  (b) consistent with the proxy ceilings and ranges set forth in § 51.513.

Pricing options

Option 1: 10% of loop proxy rates

- Loop proxy rates adopted as part of pricing rules in the 1996 Local Competition Order. 47 CFR § 51.513 (proxy rate ceilings for every state). These proxies are currently effective, having been reinstated by the Supreme Court in *AT&T v. Iowa Utilities Board.* [See attached Eighth Circuit Order.]
- UNE rates "shall not vary on the basis of the class of customers served by the requesting carrier, or on the type of services that the requesting carrier purchasing such elements uses them to provide." 47 CFR § 51.503(c). Thus, ILECs cannot impose different charges for CLECs and the ILEC's own retail operation, nor for different "flavors" of xDSL or differences between "digital" and "analog" loops.
- "Nonrecurring charges . . . shall not permit an incumbent LEC to recover more than the total forward-looking economic cost of providing the applicable element." § 51.507(e). ILECs should be permitted to charge reasonable nonrecurring cost-based rates for line sharing ordered by a CLEC. NRCs must be

based on the most efficient forward-looking network configuration – which does not include charging for loop conditioning. 47 CFR § 51.505(b)(1).

Option 2: 10% of average of state commission-set UNE loop rates

- Base 10% of loop rate not on FCC-adopted proxy rates, but on loop rates already established by state commissions. [See attached chart]
- Average of the digital loop rates in the largest state in each of the Bell Operating Company regions is a reasonable exercise of Commission discretion, utilizing the decisions of 10% of the state commissions in the country.

Where does the 10% come from?

- FCC has section 201(b) authority to adopt interim measures to ensure incumbent LEC nondiscrimination requirement is met and remedy current discriminatory practices: otherwise, ILECs continue to provide line sharing to themselves while the state pricing proceedings are underway, violating the nondiscrimination requirements of the Act.
- ILECs are recovering full cost of line sharing pursuant to this interim measure:
    - Voice customer is paying full loop cost (state commission proceeding should take into account this potential inequity when conducting pricing proceedings).
    - ILEC xDSL tariffs reflect their view that the full loop cost is recovered from the voice customer.
    - ILECs will recover costs of implementing line sharing through reasonable nonrecurring charges.

- 10% is a reasonable estimation of ILEC profit (rate of return) on existing loop plant. Thus, if the Commission wishes to grant additional revenue to ILECs for providing line sharing capability, 10% of the overall recurring loop cost is appropriate.
    - For example, the Commission's prescribed rate of return for ILEC interstate access is currently 11.25%.
- Double recovery of rate of return on loop plant (ILECs take a profit on a single loop from both the voice customer and the CLEC purchasing line sharing) must be resolved in the future, either by the FCC, the states, or perhaps the federal-state joint board on separation.
    - Real world impact is minimal until substantial volume of line sharing loops is installed. CLECs cannot wait the outcome of all pricing issues while ILECs give themselves line sharing capability.
    - Future FCC inquiry can and should address this issue, and should consider federal tariffing as an appropriate solution.

State	RBOC	Zone 1 (or statewide)	Zone 2	Zone 3	Average Loop Cost	Non-Recurring Charges
California	PacBell	$13.81 – basic $20.06 – ISDN	$15.81 – basic $23.06 - ISDN	$20.81 – basic $30.56 - ISDN	$16.81 – basic $26.84 - ISDN	$70.75 – Service charge
New York	Bell Atlantic	$12.94 – basic $24.27 – digital	$19.24 – basic $31.04 - digital		$15.87 - basic $27.66 - digital	$22.99 (basic) – Service order and connection $77.67 (digital) – Service order and connection
Washington	US West	$12.74 - digital			$12.74 - digital	$26.06 – Residential $100.00 – tech dispatch
Florida	BellSouth	$13.00 – ISDN $15.81 - DSL			$13.00 – ISDN $15.81 - DSL	$88.00 – Service charge (ISDN) $113.95 – Service charge (DSL)
Illinois	Ameritech	$2.59 - basic/ DSL $3.79 – digital	$7.07 - basic/ DSL $8.88 - digital	$11.40 - basic/ DSL $13.68 - digital	$10.53- basic/ DSL $8.78 - digital	$38.25 – service order and line connection
Five State Average		$11.02 – basic $15.33 - digital	$13.57 $18.31	$15.43 $20.77	$13.79 $18.37	$69.21 $85.37

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 96-3321/3406/3410/3414/3416/3418/3424/3430/3436/3444/3450/
3453/3460/3507/3520/3603/3604/3608/3696/3708/3709/3756/3901/3906/
3982/3274

Iowa Utilities Board,	*	
	*	
Petitioner,	*	
	*	On Remand From The
vs.	*	Supreme Court of The United
	*	States
FCC, et. al.	*	
	*	
Respondents.	*	

ORDER

Filed: June 10, 1999

Before Wollman, Chief Judge, Bowman and Hansen, Circuit Judges.

This case has been reversed in part, affirmed in part, and remanded for further consideration by the Supreme Court of the United States, see AT&T Corp. v. Iowa Utilities Board, 525 U.S. ____, 119 S. Ct. 721 (1999), and the parties have filed numerous motions and suggestions as to how this court should now proceed. The court, having carefully considered the Supreme Court's opinion and the pending matters, now enters the following order.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That portion of this court's judgment of July 18, 1997, as amended on rehearing October 14, 1997, and reported at 120 F.3d 753 (8th Cir. 1997) (hereafter "judgment"), which vacated the FCC's pricing rules found at 47 C.F.R. § 51.501-51.515 (inclusive), § 51.601-51.611(inclusive), and § 51.701-51.717 (inclusive) is vacated. The previously vacated pricing rules, including

those establishing "proxy prices" are reinstated. The court's previously issued mandate is amended accordingly.

2. That portion of the judgment which vacated 47 C.F.R. § 51.809 (the "pick and choose" rule) is vacated, and the "pick and choose" rule is reinstated. The court's previously issued mandate is amended accordingly.

3. Those portions of the judgment which vacated 47 C.F.R. § 51.303 (a rule regarding state commission review of preexisting interconnection agreements) and 47 C.F.R. § 51.405 (a rule regarding rural exemptions) are vacated, and the cited rules are reinstated. The court's previously issued mandate is amended accordingly.

4. Pursuant to the mandate of the Supreme Court, 47 C.F.R. § 51.319 is vacated. See 119 S. Ct. at 736. This court's previously issued mandate is amended accordingly.

5. That portion of the judgment which vacated 47 C.F.R. § 51.315(b) is vacated, and the cited rule is reinstated. The court's previously issued mandate is amended accordingly.

6. That portion of the judgment which vacated paragraphs 121-128 of the FCC's First Report and Order dealing with the FCC's authority under Section 208 is vacated because the Supreme Court held that the issues were not ripe for this court's review, and those previously vacated paragraphs are reinstated. The court's previously issued mandate is amended accordingly.

7. The following schedule for the briefing and oral argument of those issues remaining and as yet undisposed of is established:

a. Friday, July 16, 1999

Petitioners' and Supporting Intervenors' supplemental opening briefs are due on the remaining issues not reached in this court's first opinion, including the continuing validity and potential disposition of 47 C.F.R. § 51.317. The briefs should also address whether or not, in light of the Supreme

Court's decision, this court should take any further action with respect to §§ 51.305(a)(4) and 51.311(c) (the "superior quality" rules) and § 51.315(c)-(f) (unbundling rules). **Any issue the merits of which this court did not address in its initial opinion because of its ruling on the jurisdictional issue(s) must be separately and individually identified and argued in the supplemental briefs, or the issue will be deemed waived.** The joint brief of the Petitioners and the joint brief of the Intervenors in support of the Petitioners together are limited to a combined length of 28,000 words to be divided among the parties as they may agree.

b. Monday, August 16, 1999

The opening joint brief of the FCC and the United States (Federal Respondents) is due, limited to 28,000 words. A single joint brief by Intervenors in support of the Federal Respondents is also due, limited to 14,000 words divided among those Intervenors as they may agree.

c. Tuesday, August 31, 1999

Reply Briefs from the Petitioners and their supporting Intervenors are due, not to exceed 14,000 words total to be divided among those parties as they may agree. Petitioners shall file a joint reply brief, and the Intervenors in support of the Petitioners shall file a joint reply brief.

d. Friday, September 17, 1999

Oral argument is set for **8:30 a.m. , Friday, September 17, 1999,** in **St. Louis, Missouri** under the following time limitations: 45 minutes opening argument for the Petitioners and the Intervenors in Support of the Petitioners to be divided among themselves as the parties may agree; 45 minutes argument time for the Federal Respondents and the Intervenors in Support of the Federal Respondents to be divided among themselves as the parties may agree; 20 minutes rebuttal time for the Petitioners.

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit.